

October 13, 2005

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Holmes & Narver, Inc.

Date of Filing: August 25, 2005

Case Number: TFA-0117

On August 25, 2005, Holmes & Narver, Inc. (Holmes) filed an appeal from a determination issued to it on July 28, 2005, by the Department of Energy's (DOE) National Nuclear Security Administration Service Center, Albuquerque (NNSA). In that determination, NNSA responded to a request for a document that Holmes submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. NNSA released the document but withheld most of the information contained therein pursuant to FOIA Exemptions 5 and 6. This appeal, if granted, would require NNSA to release the withheld information to Holmes.

I. Background

On July 27, 2005, Holmes requested from NNSA one document entitled "SURF Lessons Learned Documentation." On July 28, 2005, NNSA released the "publicly available" version of the document to Holmes. Letter from Carolyn A. Becknell, NNSA, to Robyn L. Miller, Holmes (July 28, 2005) (Determination Letter). However, most of the information in the document was withheld. The original Determination Letter did not contain a justification for withholding the information in the document. In a subsequent determination letter, NNSA justified most of the withholdings under FOIA Exemption 5, by stating:

The withheld information contains the opinions and recommendations of reviewers as to why this project was cancelled. Their opinions and recommendations were provided for the purpose of determining how processes for future projects of this kind might be improved. Their opinions and recommendations are the analyses of the reviewers and release of their candid appraisals would have a chilling effect on such evaluations in the future.

Letter from Tracy L. Loughhead, NNSA, to Robyn Miller, Holmes (August 30, 2005) (Supplemental Determination Letter). NNSA further stated that, pursuant to FOIA Exemption 6, the names of employees were withheld because, "[a]s the release of contractor

employees...would not reveal anything of significance to the public and might cause inevitable harassment, the interest in protecting against the invasion of the individual's privacy far outweighs the public interest in such disclosure." Supplemental Determination Letter.

Holmes filed the present appeal on August 25, 2005 and supplemented its appeal on September 12, 2005. Letter from Robyn L. Miller, Holmes, to Samuel W. Bodman, Secretary of Energy (August 18, 2005); Letter from Robyn L. Miller, Holmes, to OHA (September 12, 2005).

II. Analysis

Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents that are "inter-agency or intra-agency" memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). Exemption 5 permits withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated, under the deliberative process privilege. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). In order to be shielded by this privilege, a record must be both predecisional, i.e. generated before the adoption of agency policy, and deliberative, i.e. reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980) (*Coastal States*). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters. It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958).

After reviewing the document at issue, we have concluded that the determination made by NNSA in applying Exemption 5 was correct. The withheld information consists of comments, recommendations and opinions prepared by DOE employees and intended only for internal DOE use; therefore, the requested document falls within the definition of "intra-agency memoranda" in the FOIA. In addition, the comments, recommendations, and opinions withheld are clearly predecisional and deliberative. They were generated following the cancellation of a particular program in order to develop improved processes for implementing similar projects in the future. Accordingly, we hold that the comments, recommendations, and opinions withheld from the requested document meet the requirements for withholding material under the deliberative process privilege of Exemption 5.¹

Segregability of Non-Exempt Information

The FOIA also requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this

¹ Names were withheld from the document under Exemption 6. However, Holmes is not challenging that withholding and, therefore, we need not reach the issue of whether Exemption 6 was properly applied to the names.

subsection.” 5 U.S.C. § 552(b); *see Greg Long*, 25 DOE ¶ 80,129 (1995). However, material need not be segregated and released when the exempt and nonexempt material are so “inextricably intertwined” that release of the nonexempt material would compromise the exempt material, or where nonexempt material is so small and interspersed with exempt material that it would pose “an inordinate burden” to segregate it. *Lead Industries Assoc. v. OSHA*, 610 F.2d 70, 85 (2nd Cir. 1979).

In this case, the document consists almost entirely of exempt comments, opinions, and recommendations. NNSA released the title page, the table of contents, and the first paragraph of page one of the document. However, our review of this document finds that it contains some factual information that appears to be reasonably segregable from the exempt portions of the document. For example, sentence one of paragraph two on page one and sentence one of paragraph three on page two appear to be factual statements. Also, NNSA redacted the section headings despite the fact that the table of contents, with those same section headings, was not withheld. Accordingly, we shall remand this matter to NNSA. On remand, NNSA must review the document and segregate and release all purely factual portions, or issue a new determination that justifies withholding the factual portions of the document.

This Decision and Order has been reviewed by the National Nuclear Security Administration (NNSA), which has determined that, in the absence of an appeal or upon conclusion of an unsuccessful appeal, the Decision and Order shall be implemented by each affected NNSA element, official, or employee, and by each affected contractor.

It Is Therefore Ordered That:

- (1) The Appeal filed on August 25, 2005 by Holmes & Narver, Inc., OHA Case No. TFA-0117, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.
- (2) This matter is hereby remanded to the National Nuclear Security Administration for further proceedings in accordance with the instructions set forth in this Decision and Order.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 13, 2005